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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/698,301	10/27/2000	Michael John Niemeyer	KCC-15,568	5826

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EXAMINER
GRAYSON, ANGELA J

ART UNIT	PAPER NUMBER
3765	

DATE MAILED: 11/20/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/698,301	Applicant(s) NIEMEYER ET AL.	
	Examiner Angela J. Grayson, Esq.	Art Unit 3765	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *Application filed on 10-27-2000* .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-35* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-35* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *27 October 2000* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) *3,6* .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

3. Claims1-7; 9-15; 17-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over US Patent No. 5,792,132 to Garcia in view of 5,509,913 to Yeo.

As to claims 1, 9, and 17Garcia discloses an absorbent assembly having a chassis defining a waist opening and first and second leg openings, the chassis having a liquid-permeable body side liner and an absorbent assembly between the body liner and the outer cover (Figure 1; Abstract disclosing invention directed to a diaper which implicitly contains the claimed features). However Garcia fails to disclose a selectively or partially liquid-permeable outer cover, but Yeo makes such a disclosure. Yeo

discloses a water dispersible but urine stable material (See Abstract). It would have been obvious to one of ordinary skill in the art to substitute the drainage device of Garcia with the water dispersible material of Yeo, since the Yeo substances minimize the size of the drainage device and is more economical to implement.

As to claims 2, 3, 4, 10, 11, 12, 18, 19, and 20, Garcia in view of Yeo disclose an absorbent garment as in claims 1 and 9, but fails to disclose wherein the outer cover is liquid-permeable only liquid having a hydrostatic pressure greater than about 1, 2, 5 or inches. However, hydrostatic pressure is pressure encountered due to fluids at rest, and the drainage is partially due to the size of the drainage hole. It would have been obvious to one having ordinary skill in the art at the time the invention was made to optimum value of the hole drainage size, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

As to claims 5 and 13, Garcia in view of Yeo discloses an absorbent garment as in clams 1 and 9, further comprising a crotch area in the chassis between the first and second openings, wherein the crotch area of the outer cover is more liquid permeable than the rest of the outer cover. (Since Garcia in view of Yeo discloses the drainage aperture covered with a water dispersible material, but the remainder of the outer cover comprised of traditional liquid impermeable material, it is inherent that the portion of the outer cover containing the aperture will be more liquid permeable than the rest of the outer cover).

As to claims 21-23, Garcia in view of Yeo discloses an absorbent garment as in claim 17, but fails to disclose wherein 5%-100%; 8%-50%; 10%-25 of the surface area of the outer cover is liquid-permeable. (Since Garcia in view of Yeo discloses the drainage aperture covered with a water dispersible material, but the remainder of the outer cover comprised of traditional liquid impermeable material, it is inherent that the portion of the outer cover containing the aperture will be more liquid permeable than the rest of the outer cover. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the percentage of permeability, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

As to claims 6 14, and 24 Garcia in view of Yeo discloses an absorbent as in claims 5 13, and 17 but fails to disclose further comprising a plurality of apertures in the crotch area of the outer cover. However, it would have been an obvious matter of design choice to design the absorbent garment having a plurality of apertures rather than a single aperture, since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

As to claims 7, 15 Garcia in view of Yea discloses an absorbent as in claims 5 and 13 wherein the absorbent assembly directs incoming aqueous fluids away from the crotch area. (See Garcia Abstract).

As to claims 21-23, Garcia in view of Yeo discloses an absorbent garment as in claim 17, but fails to disclose wherein 5%-100%; 8%-50%; 10%-25 of the surface area

of the outer cover is liquid-permeable. (Since Garcia in view of Yeo discloses the drainage aperture covered with a water dispersible material, but the remainder of the outer cover comprised of traditional liquid impermeable material, it is inherent that the portion of the outer cover containing the aperture will be more liquid permeable than the rest of the outer cover. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the percentage of permeability, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

4. Claims 8 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Garcia in view of Yeo in further view of Des 377, 980 to Slingland.

As to claims 8 and 16, Garcia in view of Yeo discloses an absorbent garment, but fails to disclose a disposable swim diaper. Slingland makes such a disclosure. It would have been obvious to one of ordinary skill in the art to incorporate the design features of Garcia in view of Yeo since the drainage system can improve the comfort of the wearer.

5. Claims 25-35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Garcia in view of Yeo in further view of US Patent No. 5,674,2132 to Sauer.

As to claim 25, Garcia in view of Yeo disclose an absorbent garment as in claim 17, but fails to disclose further comprising a pair of liquid-permeable containment flaps adjacent the first and second leg openings in the crotch area. Sauer makes such a disclosure (Figure 1 member 10). It would have been obvious to one of ordinary skill in the art at the time the invention was made to design the garment of Garcia in view of Yeo with the containment flaps of Sauer since Sauer flaps discourage lateral leakage.

As to claim 26-28, Garcia in view of Yeo in further view of Sauer disclose the absorbent garment of claim 25 but fails to disclose wherein the containment flaps are liquid-permeable only to liquids having a hydrostatic pressure greater than about .5, .75 or 1.25 inches. However, hydrostatic pressure is pressure encountered due to fluids at rest, and the drainage is partially due to the size of the drainage hole. It would have been obvious to one having ordinary skill in the art at the time the invention was made to optimum value of the hole drainage size, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

As to claims 29-31, Garcia in view of Yeo in further view of Sauer disclose the absorbent garment of claim 25, but fails to disclose wherein 5%-100%; 10%-50%; 10%-30% of surface area of the containment flaps is liquid permeable.

As to claim 32, Garcia in view of Yeo in further view of Sauer disclose the absorbent garment of claim 25, but fails to disclose wherein the containment flaps comprise a gradient of permeability, with a first longitudinal edge of each flap having greater permeability than a second longitudinal edge of each flap. It would have been an obvious matter of design choice modify the permeability of the flaps, since such a modification would have involved a mere change in the form or shape of a component. A change in form or shape is generally recognized as being within the level of ordinary skill in the art. In re Dailey, 149 USPQ 47 (CCPA 1976).

As to claim 33, Garcia in view of Yeo in further view of Sauer disclose the absorbent garment of claim 25, wherein the first longitudinal edge of each flap is attached to the chassis. (See Sauer Figure 1 member 10).

As to claims 34 and 35, Garcia in view of Yeo in further view of Sauer disclose the absorbent garment of claim 25, further comprising a plurality of apertures in the containment flaps; wherein the absorbent assembly directs incoming aqueous fluids away from the containment flaps. (See Sauer Figure 1 member 12).

Double Patenting

6. The nonstatutory obviousness-type double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory obviousness-type double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

7. Claims 1-35 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-40 of copending Application No. 09,698,346 and claims 1-29 of copending Application No. 09,749,253. Although the conflicting claims are not identical, they are not patentably distinct from each other because they are both directed to the drainage system of disposable swimwear having apertures in the crotch with the only difference is that one

application is temperature dependent and the other is dependent on hydrostatic pressure.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Angela J. Grayson, Esq. whose telephone number is 703-305-1806. The examiner can normally be reached on Monday-Thursday from 9:30 am to 7:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John J. Calvert can be reached on 703-305-1025. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9302 for regular communications and 703-872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0873.

Angela J. Grayson, Esq.
November 17, 2002

JOHN J. CALVERT
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3700